

1 disability. (Tr. 85, 109.) Benefits were denied initially and on
2 reconsideration. (Tr. 39, 43.) Plaintiff requested a hearing before
3 an administrative law judge (ALJ), which was held before ALJ Richard
4 Say on October 23, 2006. (Tr. 354-389.) Plaintiff, who was present
5 and represented by counsel, Plaintiff's spouse and vocational expert
6 Thomas Moreland testified. The ALJ denied benefits and the Appeals
7 Council denied review. (Tr. 6-8.) The instant matter is before this
8 court pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of the case are set forth in detail in the transcript
11 of proceedings, and are briefly summarized here. At the time of the
12 hearing, Plaintiff was 53 years old and had a high-school education.
13 (Tr. 357.) He was married and lived with his spouse and two
14 daughters. (Tr. 358.) Plaintiff had past work experience as a taxi
15 driver, dispatcher, construction worker, delivery driver, leather
16 worker and auto mechanic. (Tr. 62, 93, 379-82.) Plaintiff testified
17 he was diagnosed with hepatitis C in April 2004, and went through
18 treatment until March 2005. (Tr. 359.) He stated his claimed
19 disability was due mostly to fatigue caused by the hepatitis C. He
20 testified he needed naps, some of which lasted all day, and was unable
21 to sustain activities for a whole day. The fatigue also clouded his
22 mind. (Tr. 361-62, 366.) He stated that if he overextended himself,
23 he would feel sick and fatigued for two or three days after. (*Id.*)
24 Attempts to do recreational activities caused him extreme fatigue.
25 (Tr. 374.) He tried to do some leather repair work when he was
26 feeling well, and some auto work in his garage; he also performed some
27 household chores. (Tr. 362, 364.) He testified someone would have to
28 drive him to jobs that were out of town because his mind would not

1 function when fatigued. (Tr. 368.) He stated he could not work five
2 days a week and probably would miss five to ten days per month due to
3 fatigue. (Tr. 372.) Plaintiff's spouse testified when she was at
4 home, Plaintiff was usually taking a nap. She stated he did not do
5 housework routinely, only occasionally when he helped her with the
6 dishes and make the bed. She testified his fatigue began before he
7 was diagnosed with hepatitis C. (Tr. 376-77.)

8 **ADMINISTRATIVE DECISION**

9 ALJ Say found Plaintiff met the insured status requirements for
10 DIB through June 30, 2007. (Tr. 16.) At step one of the sequential
11 evaluation, the ALJ found Plaintiff had not engaged in substantial
12 gainful activity since the alleged onset date. (*Id.*) At steps two
13 and three, he found Plaintiff had the severe impairment of a "history
14 of hepatitis C treated October 2004 to March 2005, status post
15 fracture of L2, L3, and degenerative joint disease of the right knee,
16 status post arthroscopy," (*Id.*) but these impairments did not meet or
17 equal one of the listed impairments in 20 C.F.R., Appendix 1, Subpart
18 P, Regulations No. 4 (Listings). (Tr. 19.). The ALJ found
19 Plaintiff's complaints regarding limitations caused by his impairment
20 (primarily fatigue) were not totally credible. (Tr. 20.) At step
21 four, he determined Plaintiff had the residual functional capacity
22 (RFC) "for a wide range of light work," and as a result he could not
23 perform past work in the medium and heavy ranges. (Tr. 21.) He
24 concluded that with this RFC, Plaintiff could perform his past
25 relevant work as a taxi driver and as a dispatcher and, thus, was not
26 under a disability as defined in the Social Security Act at any time
27 through the date of his decision. (*Id.*)

STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the standard of review:

A district court's order upholding the Commissioner's denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A).

1 Thus, the definition of disability consists of both medical
2 and vocational components.

3 In evaluating whether a claimant suffers from a
4 disability, an ALJ must apply a five-step sequential inquiry
5 addressing both components of the definition, until a
6 question is answered affirmatively or negatively in such a
7 way that an ultimate determination can be made. 20 C.F.R. §§
8 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the
burden of proving that [s]he is disabled." *Meanel v. Apfel*,
172 F.3d 1111, 1113 (9th Cir. 1999). This requires the
presentation of "complete and detailed objective medical
reports of h[is] condition from licensed medical
professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b),
404.1513(d)).

9 It is the role of the trier of fact, not this court, to resolve
10 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
11 supports more than one rational interpretation, the court may not
12 substitute its judgment for that of the Commissioner. *Tackett*, 180
13 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). If
14 there is substantial evidence to support the administrative findings,
15 or if there is conflicting evidence that will support a finding of
16 either disability or non-disability, the finding of the Commissioner
17 is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
18 1987). Nevertheless, a decision supported by substantial evidence will
19 still be set aside if the proper legal standards were not applied in
20 weighing the evidence and making the decision. *Browner v. Secretary*
21 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

22 ISSUES

23 The question is whether the ALJ's decision is supported by
24 substantial evidence and free of legal error. Plaintiff argues he is
25 entitled to an immediate award of benefits because his treating
26 physician issued an uncontradicted post-hearing medical opinion that,
27 based on objective medical testing, Plaintiff meets Section 5.05 of
28 the Listings. (Ct. Rec. 11 at 6.) Plaintiff also challenges the

1 ALJ's credibility findings as unsupported by substantial evidence.
2 (Ct. Rec. 19 at 5-6.)

3 DISCUSSION

4 A. Credibility

5 An ALJ must provide specific and cogent reasons for rejecting a
6 claimant's subjective complaints. In the absence of affirmative
7 evidence of malingering, the ALJ's reasons must be "clear and
8 convincing." *Morgan*, 169 F.3d at 599. When the ALJ finds the
9 claimant's testimony as to the severity of impairments and symptoms is
10 unreliable, the ALJ must make a credibility determination with
11 findings sufficiently specific to permit the court to conclude the ALJ
12 did not arbitrarily discredit claimant's testimony. *Bunnell v.*
13 *Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc). The
14 following factors may be considered: (1) the claimant's reputation for
15 truthfulness; (2) inconsistencies in the claimant's testimony or
16 between his testimony and his conduct; (3) claimant's daily living
17 activities; (4) claimant's work record; and (5) testimony from
18 physicians or third parties concerning the nature, severity, and
19 effect of claimant's condition. *Thomas v. Barnhart*, 278 F.3d 947, 958
20 (9th Cir. 2002). "[O]nce the claimant produces objective medical
21 evidence of an underlying impairment, an adjudicator may not reject a
22 claimant's subjective complaints based solely on a lack of objective
23 medical evidence to fully corroborate the alleged severity of
24 [disabling symptoms]." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th
25 Cir. 1991) (citation omitted). Furthermore, "the ALJ must
26 specifically identify the testimony she or he finds not to be credible
27 and must explain what evidence undermines the testimony." *Holohan v.*
28 *Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001)(citation omitted).

1 In his decision, the ALJ found:

2 Having considered the claimant's assertion of disability,
3 the undersigned finds that his subjective complaints
4 regarding the extent of his functional limitations are not
5 fully credible. His primary complaint is fatigue. However,
6 the record does not support such severe degree of fatigue
7 that he is unable to work in any capacity. Indeed, he has
8 worked repairing leather and doing automobile mechanical
work during his alleged period of disability, both of which
are considered medium level work. Additionally, he reported
golfing and skiing which required considerable exertion.
None of claimant's treating physicians have reported that he
is so significantly limited that he is unable to work.

9 (Tr. 20.) Plaintiff correctly argues the ALJ did not provide legally
10 sufficient reasons for rejecting his testimony. (Ct. Rec. 19 at 4-7.)

11 Plaintiff was diagnosed with hepatitis C in April 2004, after
12 experiencing fatigue that prevented him from working on a sustained
13 basis. (Tr. 61, 133, 137, 359.) In August 2004, he consulted with
14 James Goff, M.D., regarding treatment for the disease which was
15 causing increasing fatigue. (Tr. 133-34.) At that time, he reported
16 being unable to work a full day and unable to know if he could work
17 every day due to fatigue. (Tr. 61.) Dr. Goff recommended interferon
18 treatment, which began in October 2004. In December 2004, Plaintiff
19 stated in a disability report that he was working at home only four to
20 five hours a week due to hepatitis-related fatigue. (Tr. 90.) Fatigue
21 was consistently the main symptom reported in clinic records, although
22 it improved somewhat off treatment. (Tr. 139, 234, 236, 238, 257,
23 260, 270, 300.) During his treatment, Plaintiff fell on icy steps and
24 broke his back in two places. Later he injured his knee while skiing.
25 Both injuries required surgery and rehabilitation. (Tr. 227, 229,
26 239, 245.)

27 Plaintiff's initial treatment with interferon ended in March
28 2005, but his symptoms returned in July 2005. Laboratory tests

1 revealed an increased viral load and relapse of hepatitis C. (Tr.
2 238.) In July 2005, Dr. Goff offered a second, longer treatment
3 regime (48 weeks) with interferon, which he predicted would result in
4 increased side effects, including fatigue, and a lesser probability of
5 success. (Tr. 234-36.) Plaintiff declined to go through additional
6 treatment because of the side effects. He continued to complain of
7 the fatigue through September 2006. (Tr. 238, 261, 270, 328.) At the
8 hearing, Plaintiff testified he felt he was more susceptible to injury
9 because of the hepatitis C. He stated the effects of the fatigue were
10 difficult to describe; the fatigue would come on suddenly, "hitting
11 him hard," and his mind became clouded when he was fatigued, making it
12 difficult for him to think straight or make good judgment calls. (Tr.
13 362, 365-66.) He testified that when the fatigue comes on, he has to
14 take a nap for three hours, that he has good days and bad days, and if
15 he overextends himself, he will be "down for two, three days I'm sick
16 not feeling well, fatigued." (Tr. 362.)

17 He reported attempts to carry on with his leather repair work,
18 taking small jobs in his house, and having his daughter drive to out
19 of town jobs, where the actual repair work took about one half hour to
20 an hour and a half. (Tr. 362, 367.) Plaintiff also reported two
21 attempts to play golf and a ski trip during the alleged disability
22 period, and testified that both attempts left him exhausted, and in
23 the case of skiing, injured. (Tr. 365, 374.) He also reported he
24 tried to do household chores, which his wife testified he was not
25 really able to do. (Tr. 364.) She also testified he was suffering
26 from fatigue before the actual diagnosis. (Tr. 376-77.) The ALJ
27 found Mrs. Tanner's testimony consistent with that of Plaintiff's and
28 did not reject her testimony. (Tr. 20.)

1 Plaintiff has presented objective medical evidence of hepatitis
2 C, a severe impairment. Disability examiner Cheri Glore reported
3 Plaintiff's symptoms were credible and consistent with hepatitis C,
4 prior and during treatment. (Tr. 157.) As discussed above, medical
5 records from Dr. Goff and the Deer Park Medical Clinic confirm the
6 diagnosis and symptoms. There being no evidence of malingering,
7 Plaintiff's testimony can be rejected only for "clear and convincing"
8 reasons. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9th Cir.
9 2007); *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001); *Lester*
10 *v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

11 Plaintiff's unsuccessful attempts to lead a normal life, do light
12 household tasks and attempt to support his family with his part-time
13 leather work and work in his garage are not inconsistent with his
14 complaints that the hepatitis related fatigue prevented him from
15 sustaining work activities beyond four to six hours a week. See
16 *Lingenfelter*, 504 F.3d at 1038 (failed attempt to work not "clear and
17 convincing" reason to impugn credibility); *Fair v. Bowen*, 885 F.2d
18 597, 603 (9th Cir. 1989) (claimant does not have to be "utterly
19 incapacitated to be eligible for benefits"). Further, the court has
20 warned that a claimant "should not be penalized for attempting to
21 maintain some sense of normalcy in [his] life." *Reddick v. Chater*,
22 157 F.3d 715, 722 (9th Cir. 1998). On the contrary, Plaintiff's
23 attempts to carry on in spite of the fatigue, along with his solid
24 work record, (Tr. 118), his candid testimony regarding his frustrated
25 attempts to play golf and ski, his willingness to engage in
26 rehabilitative therapy (Tr. 229), his unwillingness to represent that
27 he can give full forty hours of work to an employer (Tr. 372), and his
28 spouse's consistent testimony, support his claim that he is unable to

1 perform work on a sustained basis. *Fair*, 885 F.2d at 603.

2 As to the other factors considered in a credibility assessment,
3 there is no indication that Plaintiff failed to seek medical treatment
4 for his condition, and his unwillingness to proceed through a second
5 trial of interferon treatment because of the adverse side effects, and
6 limited expectation of success, was reasonable. See *Fair*, 885 F.2d at
7 603; *SSR 96-7* (where a good reason for claimant's failure to pursue
8 medical treatment exists and is explained, failure to seek such
9 treatment cannot support an adverse credibility finding). Finally,
10 none of Plaintiff's medical providers noted concerns about his
11 credibility. The ALJ's failure to articulate "clear and convincing"
12 reasons for rejecting Plaintiff's subjective complaints regarding the
13 severity of his fatigue is reversible error. *Orn v. Astrue*, 495 F.3d
14 625, 640 (9th Cir. 2007).

15 **B. Remedy**

16 The Ninth Circuit recently held. "When an ALJ's reasons for
17 rejecting the claimant's testimony are legally insufficient and it is
18 clear from the record that the ALJ would be required to determine the
19 claimant disabled if he had credited the claimant's testimony, we
20 remand for calculation of benefits." *Orn*, 495 F.3d at 639; see also
21 *McCartey v. Massanari*, 298 F.3d 1072, 1077 (9th Cir. 2002); *Smolen*, 80
22 F.3d at 1292 (court has the discretion to remand for award of
23 benefits); *Lester*, 81 F.3d at 834; *Swenson v. Sullivan*, 876 F.2d 683,
24 689 (9th Cir. 1989) (crediting claimant testimony and awarding
25 benefits).

26 After hearing Plaintiff's testimony, vocational expert Thomas
27 Moreland observed that if Plaintiff's testimony were credited, fatigue
28 would be a very important issue in determining whether Plaintiff could

1 perform past work. (Tr. 385.) He testified that if Plaintiff's
2 testimony regarding fatigue were credited, he did not believe
3 Plaintiff could perform work. Specifically, Mr. Moreland opined that,
4 "[t]he need to take naps daily maybe in the p.m. or afternoon for
5 three hours, indicating he had bad days where he has to take naps as
6 needed, I think that would interfere with the ability to perform
7 substantial gainful activity on a reasonably continuous basis based on
8 [his testimony]." (Tr. 385.)

9 Crediting the Plaintiff's testimony as true, the vocational
10 expert's testimony that Plaintiff's level of fatigue and need for
11 daily naps would preclude work is supported by substantial evidence;
12 therefore, remand for calculation of benefits from April 15, 2004,
13 (Tr. 61, 359) and award of benefits is appropriate. *Id.* Accordingly,

14 **IT IS ORDERED:**

15 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 10**) is
16 **GRANTED**. This matter is remanded to the Commissioner for calculation
17 and immediate award of benefits.

18 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is
19 **DENIED**;

20 3. An application for attorney fees may be filed by separate
21 motion.

22 The District Court Executive is directed to file this Order and
23 provide a copy to counsel for Plaintiff and Defendant. Judgment shall
24 be entered for Plaintiff and the file shall be **CLOSED**.

25 DATED January 16, 2008.

26
27 S/ CYNTHIA IMBROGNO
28 UNITED STATES MAGISTRATE JUDGE